Tan Guan Eng & Anor v Ng Kweng Hee & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 22-73-90
EDGAR JOSEPH JR J
21 JUNE 1991

Companies and Corporations — *Proper plaintiff rule — Plaintiff a shareholder and director of parent company — Whether plaintiff has locus standi to sue subsidiary company — Whether issue of locus standi should be decided as a preliminary point or at conclusion of trial*

Words and Phrases — *'Locus standi'*

The first plaintiff is a shareholder and director of the ninth defendant, Dragon Enterprises Sdn Bhd ('Dragon'). Dragon is the holding company and controlling shareholder of Thean Seng Co Sdn Bhd ('TSS'), the eighth defendant. Dragon is in turn a subsidiary of an incorporated investment company called BH Low Holdings Sdn Bhd ('BHL'). The first plaintiff is also a majority shareholder and director of BHL. The first and second defendants were the directors of both Dragon and TSS. Notice of TSS's extraordinary general meeting ('EGM') was given to pass a resolution to increase the issued and paid-up capital of TSS by way of a rights issue. The plaintiffs obtained an ex parte interlocutory injunction to restrain the holding of the EGM, alleging that the calling of the EGM by the first to seventh defendants was not a proper and/or bona fide exercise of their powers as directors of TSS because the calling of the EGM was to effect a change in the control of TSS in favour of the first to seventh defendants. The defendants applied to discharge the interlocutory injunction. The defendants claimed that the purpose of increasing TSS's capital was to finance the cost of developing TSS's property and to reduce TSS's bank borrowings. The defendants argued that the first plaintiff had no locus standi to maintain the suit against TSS because the first plaintiff was not its shareholder. The plaintiffs urged the court to lift the corporate veil of TSS and Dragon because the first and second defendants were in de jure control of Dragon and were in de facto control of TSS and that they had placed themselves in a position of conflict of interest when they promoted their own personal interest. The second plaintiff argued that he had locus standi because since the injury alleged was personal to him as a member of TSS, the rule in *Foss v Harbottle* did not apply.

Held, dismissing the application:

(1) The issue whether calling of TSS's EGM by the first to seventh defendants was a proper or bona fide exercise of their powers as TSS's directors, was neither just nor convenient to be decided without the process of a full trial.

(2) The term 'locus standi' means entitlement to judicial relief apart from the questions of the substantive merits and the legal capacity of a plaintiff.

(3) In deciding the question of locus standi, the court will proceed on the basis that allegations in the statement of claim and in the documents relied upon by the plaintiffs are true. The jurisdiction to uphold a plea of no locus standi should only be exercised very carefully in circumstances where there is no possibility of doubt.
(4) The issue of locus standi should be disposed of as a preliminary point.
(5) The traditional view of 'control' of a company is one of ownership but the new view considers who has de facto control of a company.
(6) Although each company within a group of companies is a distinct entity, in certain circumstances courts have treated a group of companies as a single corporate entity. In the circumstances of this case a prima facie case for piercing the corporate veil had been established.
(7) Both of the plaintiffs had established a prima facie case of locus standi to maintain this suit; there are also serious questions of law and fact to be tried.

[Bahasa Malaysia summary

Plaintif pertama adalah pemegang saham dan pengarah defendan kesembilan, Dragon Enterprises Sdn Bhd ('Dragon'). Dragon adalah syarikat pemegang dan pemegang saham berkuasa Thean Seng Co Sdn Bhd ('TSS'), defendan kelapan. Dragon pula adalah sebuah subsidiari syarikat pelaburan yang telah diperbadankan bernama BH Low Holdings Sdn Bhd ('BHL'). Plaintif pertama adalah juga pemegang saham majoriti dan pengarah BHL. Defendan pertama dan kedua adalah pengarah kedua-dua Dragon dan TSS. Notis tentang mesyuarat agung luar biasa TSS ('mesyuarat itu') telah diberi untuk meluluskan resolusi menambahkan modal TSS yang dikeluarkan dan dibayar penuh melalui keluaran hak. Plaintif telah mendapati injunksi interlokutori ex parte untuk menahan perlangsungan mesyuarat itu, dengan mengatakan bahawa pemanggilan mesyuarat itu oleh defendan pertama hingga ketujuh bukanlah penjalanan kuasa mereka secara wajar dan bona fide sebagai pengarah TSS kerana pemanggilan mesyuarat itu ialah untuk menghasilkan perubahan dalam penguasaan TSS untuk faedah defendan pertama hingga ketujuh. Defendan memohon untuk melepaskan injunksi interlokutori itu. Defendan mendakwa bahawa maksud penambahan modal TSS adalah untuk membiayai kos membangunkan harta TSS dan untuk mengurangkan pinjaman bank TSS. Defendan berhujah bahawa plaintif pertama tidak mempunyai locus standi untuk mempertahankan guaman terhadap TSS kerana plaintif pertama bukanlah pemegang sahamnya. Plaintif telah mendesak mahkamah untuk menyelak tabir perbadanan TSS dan Dragon kerana defendan pertama dan kedua adalah dalam penguasaan de jure Dragon dan adalah dalam penguasaan de facto TSS dan bahawa mereka telah meletakkan diri mereka dalam kedudukan yang mendirikan percanggahan kepentingan apabila mereka memajukan kepentingan diri mereka sendiri. Plaintif kedua berhujah bahawa beliau mempunyai locus standi oleh kerana memandangkan

A yang kerugian yang dikatakan itu adalah mengenai dirinya sendiri sebagai ahli TSS, rukun di dalam *Foss v Harbottle* tidak terpakai.

Diputuskan, menolak permohonan itu:

(1) Isu sama ada pemanggilan mesyuarat agung luar biasa TSS oleh defendan pertama hingga ketujuh adalah penggunaan kuasa mereka sebagai pengarah TSS dengan wajar atau bona fide, tidaklah adil mahupun sesuai diputuskan tanpa proses perbicaraan sepenuhnya.

(2) Istilah 'locus standi' bermaksud hak kepada relief kehakiman selain daripada persoalan merit substantif dan kedudukan plaintif di sisi undang-undang.

(3) Dalam memutuskan persoalan locus standi, mahkamah akan meneruskan pendengaran atas asas bahawa pengataan dalam pernyataan tuntutan dan dokumen yang kepadanya plaintif bergantung adalah benar. Bidang kuasa untuk membenarkan hujah ketiadaan locus standi harus hanya dijalankan dengan sangat berhati-hati dalam keadaan di mana tiada kemungkinan keraguan.

(4) Isu locus standi harus diselesaikan sebagai perkara permulaan.

(5) Pandangan tradisional tentang 'control' sebuah syarikat adalah dari segi keempunyaan tetapi pandangan yang baru menimbangkan siapakah yang mempunyai penguasaan de facto sebuah syarikat.

(6) Walaupun setiap syarikat dalam sekumpulan syarikat adalah entiti berlainan, dalam keadaan tertentu mahkamah telah menganggap sesuatu kumpulan syarikat sebagai entiti perbadanan tunggal. Dalam keadaan kes ini suatu kes prima facie untuk menembus tabir perbadanan telah dibuktikan.

(7) Kedua-dua plaintif telah membuktikan kes prima facie tentang locus standi untuk mempertahankan guaman ini; ada juga persoalan undang-undang dan fakta yang serius untuk dibicarakan.]

Cases referred to

1 *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504; [1975] AC 396; [1975] 2 WLR 316 (folld)

2 *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 (refd)

3 *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197; [1988] 1 WLR 1362 (folld)

4 *Hayes v Bristol Plant Hire Ltd & Ors* [1957] 1 All ER 685; [1957] 1 WLR 499 (folld)

5 *Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2)* [1982] 1 All ER 354; [1982] 2 WLR 31; [1982] Ch 204 (folld)

6 *Pavlides v Jensen* [1956] Ch 565; [1956] 3 WLR 224; [1956] 2 All ER 518 (refd)

7 *Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2)* [1980] 2 All ER 841; [1981] Ch 257, [1980] 3 WLR 543 (folld)

8 *Biala Property Ltd & Anor v Mallina Holdings Ltd* (1988) 6 ACLC 1138 (refd)

9 *Hurley & Anor v BGH Nominees Pty Ltd & Ors* (1982) 6 ACLR 791 (refd)

10 *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 Ch D 610 (refd)

11 *People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd* [1986] 1 MLJ 68 (refd)
12 *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 (refd)
13 *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852; [1976] 3 All ER 462 (folld)
14 *Salomon v A Salomon & Co Ltd* [1897] AC 22 (refd)
15 *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 WLR 352; [1955] 1 All ER 725 (folld)
16 *Burland v Earle* [1902] AC 83 (folld)
17 *Edwards v Halliwell* [1950] 2 All ER 1064; [1950] WN 537 (refd)
18 *Punt v Symons & Co Ltd* [1903] 2 Ch 506 (folld)
19 *Fraser v Whalley* (1894) 2 H & M 10; 71 ER 361 (folld)

Legislation referred to
Companies Act 1965 ss 132D, 169(5)
Companies Act (Cap 50, 1990 Ed) [Sing] s 201(3A)

Loh Siew Cheang and *Aggie Chew* (*Cheang & Ariff*) for the plaintiffs.
V Balasundaram (*Balasundaram & Co*) for the first, second and ninth defendants.
R Manecksha (*Ong & Manecksha & Co*) for the third, fourth, fifth and eighth defendants.

Edgar Joseph Jr J: This was an application to discharge an ex parte interlocutory prohibitory injunction granted by this court on 6 March 1990 ('the injunction') the effect of which was to restrain the holding of an extraordinary general meeting ('EGM') of Thean Seng Co Sdn Bhd ('TSS'), the eighth defendant herein, for the purpose of passing an ordinary resolution to increase its issued and paid-up capital.

I begin by reminding myself of what Lord Diplock said in his speech in *American Cyanamid Co v Ethicon Ltd*[1] at p 504D: 'It is no part of the court's function at this stage of the litigation' — that is, in considering a motion for the grant or discharge of an injunction, I interpolate — 'to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration.'

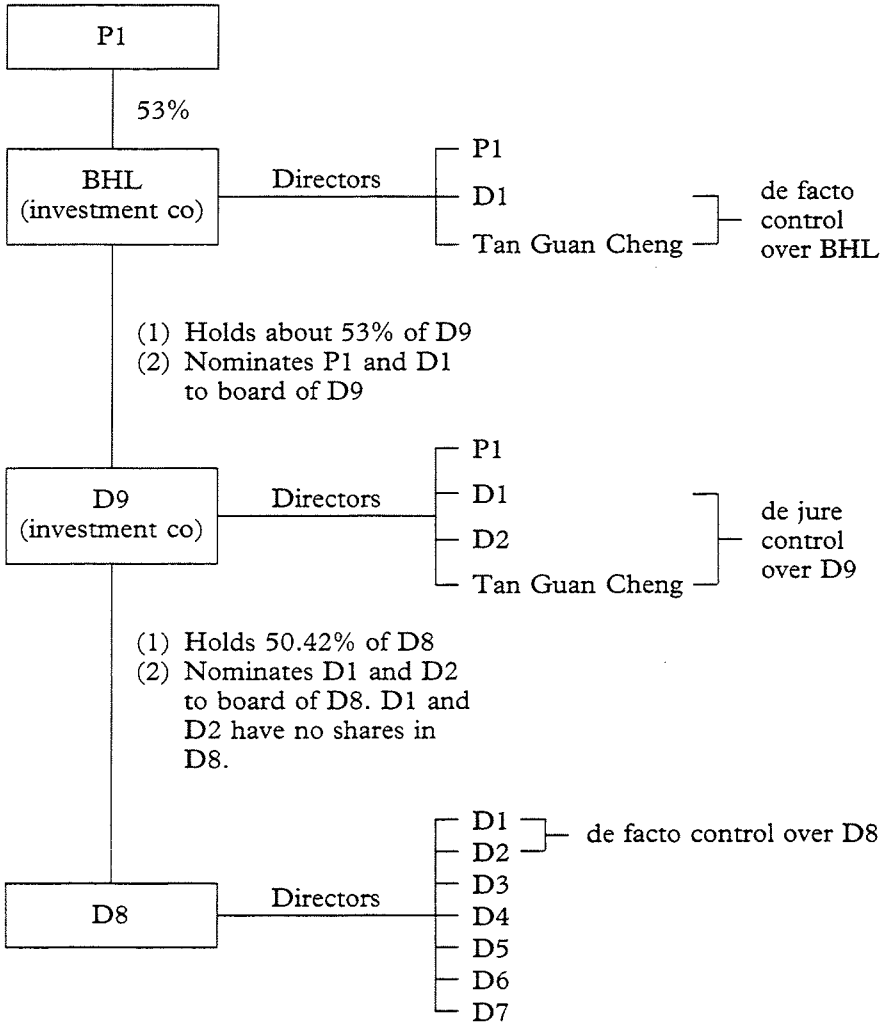
The underlying facts giving rise to this application may be stated thus: the first plaintiff is a shareholder and a director of the ninth defendant Dragon Enterprises Sdn Bhd ('Dragon') a holding company and the majority and controlling shareholder of TSS, it being the registered owner of approximately 50.42% of the total and issued and paid-up shares of TSS. In turn, Dragon is a subsidiary of an incorporated investment company called BH Low Holdings Sdn Bhd ('BHL'); more particularly, BHL is the registered owner of approximately 51% of the issued and paid-up capital of Dragon. The first plaintiff is also a majority shareholder and a director of BHL, owning 170,000 of the 320,000 issued and paid-up shares therein. The second plaintiff is a registered shareholder of 693 shares in TSS or, in other words, 5.37% of the issued and paid-up shares therein.

The first and second defendants are directors of both TSS and Dragon and, together with one Tan Guan Cheng, a brother of the first plaintiff,

form the majority on the board of directors of Dragon. The tenth and eleventh defendants are the joint secretaries of TSS.

It was alleged by the plaintiffs that the first and second defendants, together with the third to the seventh defendants, control the board of directors of TSS, although the first and second defendants are not shareholders of TSS or of Dragon. It was further alleged by the plaintiffs that the third to the seventh defendants (who are directors of TSS) are associates of or persons aligned to the first and second defendants and hold shares directly or indirectly in TSS.

According to the plaintiffs, the diagram below (wherein the first plaintiff has been referred to as 'P1' while the first to the ninth defendants have been referred to as 'D1' to 'D9' respectively) illustrates the essential structure and relationship of the companies concerned:



It was also alleged by the plaintiffs that in the early part of 1989 differences arose between the first plaintiff on the one hand and the first defendant and the said Tan Guan Cheng on the other, about the manner in which the affairs of BHL was being conducted, and that this led to the first plaintiff appointing three individuals, namely, Teh King Beng, Lim Eng Kim and Lim Chin Chong as additional directors of BHL ('the additional directors'). (For particulars of the background facts which led to these differences and the differences themselves, see the agreed statements of facts, being exh D to encl 2.) The upshot of the appointment of the additional directors was the institution of four civil suits, being Civil Suit Nos 228/89, 231/89, 363/89 and 245/89 ('the four civil suits'), subsequently consolidated.

More particularly, the plaintiff in Civil Suit No 228/89 is the first plaintiff herein while the defendants are BHL, the first defendant herein and the said Tan Guan Cheng. The primary relief prayed for was a declaration that the purported termination of an EGM by the defendants therein was unlawful and the continuation of the EGM by the first plaintiff herein at which the additional directors were elected to office as directors of BHL was lawful.

In Civil Suit No 231/89, the plaintiffs are the additional directors while the defendants are BHL, Tan Guan Cheng and Gooi Seng Hooi, a shareholder of Dragon. The primary relief prayed for was an injunction restraining the defendants therein from excluding the additional directors from acting as directors of BHL.

In Civil Suit No 363/89, the plaintiffs are BHL, the first and second defendants herein and Tan Guan Cheng while the defendants are Dragon (the ninth defendant herein) and the first plaintiff herein. And, by an order of court dated 16 August 1989, TSS (the eighth defendant herein) was added as an intervener in that suit. The primary relief prayed for was an injunction to stop an EGM of Dragon which had been called by the first and second defendants herein and was to be convened on 20 May 1989 for the purpose of stopping the first plaintiff herein who had been appointed as corporate representative of BHL to vote at that EGM, from acting as such. The business to be transacted at that EGM was the proposal of a resolution for the removal of the first and second defendants herein and the said Tan Guan Cheng as directors of Dragon.

In Civil Suit No 245/89, the plaintiffs are Ng Kweng Hee Sdn Bhd and Ng Pee King, both shareholders of Dragon, while the defendants are the additional directors. The primary relief prayed for was a declaration that the appointment of the additional directors as directors of BHL was null and void. TSS had made an application for leave to intervene and be made a party but no order has, as yet, been made thereon.

It would appear that the bone of contention in the four civil suits boiled down to a battle for the control of BHL, Dragon and ultimately of TSS. This was, perhaps, understandable because, it was alleged by counsel for the plaintiffs, and not challenged by counsel for the defendants, that TSS 'is doing extremely well, so well that it has been able to declare a dividend of 20% for the current year'.

During the pendency of the four civil suits aforesaid, the tenth and eleventh defendants in the present suit, in their capacity as joint secretaries of TSS, had given formal notice of an EGM of TSS to be held on Thursday 8 March 1990 at 3pm at 105, Beach Street, George Town, Penang, the purpose of which was the passing of a resolution to increase the issued and paid-up capital of TSS by $332,000 by way of a rights issue of 3,220 new ordinary shares of $100 each at par and that such new shares be offered to the shareholders whose names appeared on the register of members as at 1 March 1990 in the proportion of one new ordinary share for every four ordinary shares held, and that if not accepted by payment, would be deemed to be declined and any share not taken up would be dealt with by the directors in any manner they thought fit and expedient including the cancellation of such proposed issue in respect of such shares not taken up.

The first plaintiff has alleged that the calling of the EGM to increase the issued and paid-up capital of TSS by the first to the seventh defendants as directors of TSS was an improper and/or non-bona fide exercise by them of their powers, it being really a tactical manoeuvre, to achieve control of TSS by diluting the majority and controlling shareholding of Dragon in TSS under the guise of having to do so to meet the cost of developing certain property of TSS, reducing the borrowings of TSS and consequently helping to reduce the guarantors' exposure to certain banks.

More particularly, the plaintiffs have alleged that the calling of the EGM by the first to the seventh defendants to increase the paid-up capital of TSS is to effect a change in, and to consolidate the control of TSS in favour of the first to the seventh defendants by creating a new class of majority shareholders.

In support, the plaintiffs rely upon the following matters:

(1) the call for the increase in issued and paid-up capital at the proposed EGM of TSS serves no purpose as TSS is not in need of funds from the shareholders. The plaintiffs say that the proposal of raising $322,000 by way of a rights issue, if approved, will do little to dilute the borrowings of TSS which the defendants admit amount to some $5m or materially help to meet the projected cost of the development project estimated by the defendants to be about $710,000;

(2) the call for the increase in issued and paid-up capital at the proposed EGM of TSS, if approved, would have the effect of diluting Dragon's present shareholding in TSS from 50.42% to 40.35% and cause Dragon to lose the majority and controlling shareholding in TSS;

(3) the first and second defendants are the directors of Dragon and are presently having control of it;

(4) the first and second defendants are the only minority shareholders of Dragon and are presently engaged in litigation with Dragon and the first plaintiff wherein their removal as directors was upheld by Wan Adnan J in a decision given on 7 March 1990, in Penang High Court Civil Suit No 228/89 against which the first and second defendants have appealed to the Supreme Court;

(5) the ulterior purpose, the plaintiffs allege, of the call for the increase in

issued and paid-up capital at the proposed EGM of TSS, namely, that of control by the first to the seventh defendants of Dragon and TSS, could also be achieved by frustrating any unfavourable decisions which might be given by the court in the four civil suits since the effect of such decisions might be to cause the first to the seventh defendants to lose control of TSS;

(6) the first plaintiff claims, though this was denied by the defence, that initially, Dragon's secretary, one Gooi Seng Hooi, upon being queried on the telephone by the first plaintiff on 1 March 1990, as to whether Dragon's board (which comprised three directors, two of whom were and are the first and second defendants) would be meeting to appoint a corporate representative to attend the EGM of TSS, had replied that no such meeting had been called and furthermore that the other directors had instructed him not to give notice of any directors' meeting to the first plaintiff;

(7) the first plaintiff then consulted his solicitors who on the next day sent a notice to the secretary confirming the first plaintiff's version of the telephone conversation aforesaid and warning him that action would be taken against him and the first and second defendants, for 'the unlawful actions of the other directors and you in the conduct of the company (Dragon) which is calculated to prejudice the interest of our client (the first plaintiff) as a shareholder of the company (Dragon) and the largest shareholder of BHL which is the majority shareholder in the company (Dragon)';

(8) it was only after the secretary had received the solicitors' letter aforesaid that a facsimile notice dated 3 March 1990 was sent to the solicitors advising of the intention to hold a meeting of Dragon's board some three days later to appoint a corporate representative to attend the meeting of TSS's board at which it was proposed to pass the resolution authorizing the increase in the issued and paid-up capital of TSS;

(9) the first plaintiff alleges that the act of the first and second defendants in attempting through the secretary of Dragon to exclude the first plaintiff from participating in the board meeting of Dragon on 6 March 1990 was unlawful;

(10) the first plaintiff further alleges that the first and second defendants and Dragon (the ninth defendant) had wrongfully agreed between themselves to appoint a corporate representative to attend the EGM of TSS for the purpose of voting in favour of the issue of shares in TSS but against taking up such shares so as to reduce the majority holding of Dragon in TSS and that, in doing so, had exercised their powers improperly and in a non-bona fide manner;

(11) the plaintiffs also allege that the proposed increase in the paid-up capital of TSS, will benefit the third to the seventh defendants as directors of TSS in that, as Dragon, by the first and second defendants, will naturally not take up the rights issue of shares in TSS there will thereby result a new class of majority shareholders of TSS;

(12) the plaintiffs point out that none of the defendants are shareholders of Dragon and, except for the fifth and seventh defendants, none of the defendants are shareholders of TSS *whereas* Dragon is the majority shareholder of TSS. Accordingly, the plaintiffs contend that the purpose of the increase in the issued share capital is to remove any decisive role which Dragon may be able to play in the affairs of TSS and to reduce any ultimate decisive role which the first plaintiff may play in the affairs of BHL and consequently in TSS and Dragon;

(13) the plaintiffs also allege that the calling of the EGM on 8 March 1990 is not in accordance with and in breach of art 32 of the memorandum and articles of TSS which, they say, requires that an increase of capital by the creation of new shares in TSS be by a special resolution, thus resulting in a contravention of s 152 of the Companies Act 1965. Article 32 reads as follows: 'The company may from time to time by special resolution increase the capital by the creation of new shares of such amount as may be deemed expedient.'

(14) additionally, the second plaintiff alleges, though this was strongly denied by the defence, that he had been approached by representatives of the first to the seventh defendants to vote for the ordinary resolution to increase the paid-up capital of TSS and that as a reward a sum of $100,000 would be paid to him.

I must now turn to consider the case for the defence.

By their joint affidavit affirmed on 23 March 1990 (encl 8) the third, fourth and fifth defendants, as directors of TSS, began by denying that they had offered, whether directly or through any representative, any sum of money to the second plaintiff as a reward for him to vote in favour of the proposed increase in the paid-up capital of TSS as had been alleged by the second plaintiff.

Secondly, whilst admitting that the proposed EGM of TSS was to have been convened for the purpose of increasing the paid-up capital of TSS, they denied that this was done for a purpose which was not bona fide or improper. The additional call up of capital, they said, was to go towards the cost of developing TSS's property, namely, a three-storey workshop cum godown on its land at Sungei Pinang Road, the projected cost of development being $710,000. Another reason advanced for the additional call up of capital was to reduce bank borrowings of TSS amounting to some $5m, a step which was found necessary because, so far as one particular bank was concerned, a guarantor had died and another had since refused to continue as a guarantor.

In answer to the art 32 point, the third, fourth, fifth and eighth defendants contend that the call for the increase in the paid-up capital of TSS is not an increase of capital by the creation of new shares and consequently the legal consequences contended for by the plaintiffs if such call is implemented, are wrong in law.

In particular, the defendants say that out of the authorized capital of TSS of $2m made up of 20,000 shares of $100 each, there remains $710,900

made up of 7,109 shares of $100 each still unissued. What the proposed EGM of TSS seeks to achieve, they say, is to increase the paid-up capital of TSS out of the remaining 7,109 shares still unissued in the manner required by s 132D of the Companies Act 1965, and so it is entirely misleading for the plaintiffs to invoke art 32 and call the proposed exercise an attempt to create new shares as the proposed EGM does not seek to increase TSS's authorized capital.

Thirdly, the third, fourth and fifth defendants went on to contend that:

(a) the proposed share issue would not discriminate against any shareholder of TSS;
(b) the first plaintiff was not a shareholder in TSS and therefore had no locus standi to maintain the present suit;
(c) the second plaintiff also had no locus standi, by reason of the rule in *Foss v Harbottle*[2] since he had not shown any attempted fraud on himself;
(d) save for Dragon, none of the shareholders of TSS were involved in the four civil suits referred to by the plaintiffs and therefore the allegation that the proposed call up of capital in TSS was for the purpose of changing the control structure of TSS to the prejudice of the first plaintiff, or for the purpose of frustrating any court decision in the four civil suits which might not be in favour of the first and second defendants and indirectly the third to the seventh defendants, 'was immaterial as the plaintiffs had failed to show that the first to the seventh defendants were acting in concert';
(e) it was premature for the plaintiffs to allege loss of control of TSS and, in any event, such loss of control cannot amount to bad faith or improper purpose on the part of the defendants.

I shall first of all deal with the point made by counsel for the third, fourth and fifth defendants, that the injunction should be set aside on the grounds of non-disclosure or misrepresentation of material facts.

As to non-disclosure, it was contended that a perusal of paras 2, 3 and 4 of the affidavit of the first plaintiff (encl 2) on the strength of which the injunction had been granted suggests that he had not received the notice of the intended meeting of Dragon's board to be held on 6 March 1990 at 10.30am, *whereas* formal notice in writing to that effect had been given to him by the secretary on 3 March 1990, that is to say, three days before the grant of the injunction.

However, I note that by para 4 of his affidavit (encl 2) the first plaintiff had categorically stated that a facsimile notice of the intended meeting concerned had been sent to his solicitors on 3 March 1990, a day after they had sent their letter of warning to the secretary although admittedly he (the first plaintiff) did not mention that he himself had received a copy of the formal notice of meeting on 3 March 1990 by registered post.

The real point the first plaintiff was making in his affidavit (encl 2) was to allege that there had been an attempt by Dragon's secretary, acting on the instigation of the other directors of Dragon, to keep him (the first

plaintiff) in the dark regarding the intended meeting of Dragon's board on 6 March 1990 and it was not until his solicitors took the matter up by their letter of warning sent on 2 March 1990, that is to say, one day before the formal notice of meeting dated 3 March 1990 was sent, that the secretary had bestirred himself, by sending a facsimile of that formal notice to his solicitors. In these circumstances, I do not consider the omission to disclose the receipt by the first plaintiff on 3 March 1990 of the formal notice of meeting to be sufficiently material although ideally he should have done so.

I do not overlook the fact that the secretary of Dragon has disputed the fact alleged in the first plaintiff's solicitors' letter of 2 March 1990, that there was the telephone conversation between him and the first plaintiff referred to above, but it is not for me, at this stage of the proceedings, to make a finding one way or another, regarding this allegation. That will have to await the final hearing.

I would add that even had I been made aware of the receipt by the first plaintiff on 3 March 1990 of a formal notice of the intended meeting of Dragon's board on 6 March 1990, I would still have granted the injunction because I do not, for the reasons stated, consider the omission of sufficient weight.

Before concluding my views regarding this part of the case, I consider it desirable to briefly state the current attitude of the courts when dealing with applications for discharge of ex parte orders on the ground of non-disclosure. It is succinctly set out in the following passage in the judgment of Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd*:[3]

> I will deal first with the application to set aside the ex parte order. It is a basic principle, applicable to all ex parte applications, that a plaintiff seeking ex parte relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the ex parte injunction on that ground alone. But if, in the circumstances existing when the matter comes before the court inter partes, justice requires an order either continuing the ex parte injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an ex parte order obtained without due disclosure set aside: there is a discretion in the court whether to do so or not.

As to misrepresentation, counsel submitted that there had been a positive misrepresentation on the part of the plaintiffs when applying for the injunction in that they had misrepresented to the court that the calling of the EGM of TSS was neither a proper nor a bona fide exercise of the power of the first to the seventh defendants as directors of TSS. More particularly, it was said that the plaintiffs had then misrepresented to the court that the sole purpose of calling the EGM was to change the control structure of TSS so as to prejudice their positions, and thereby benefit the first to the seventh defendants, *whereas* the true purpose of calling for the EGM was to make

a call on capital to help towards the cost of developing TSS's property and to reduce its bank borrowings. A

The issue raised here, namely, whether the calling of the EGM of TSS by the first to the seventh defendants was a proper or bona fide exercise of their powers as directors of TSS, is really the basic issue which would arise for decision at the final hearing, and will involve a consideration of questions of fact and law, not free from difficulty, which it would be neither just nor convenient to decide without full trial process, such as discovery, interrogatories, oral evidence and cross-examination. Accordingly, with Lord Diplock's salutary advice in the *American Cyanamid* case[1] (quoted above) in mind, I find it quite impossible to hold, at the interlocutory stage and based on affidavit evidence alone, whether or not there has been any misrepresentation as alleged. The attempt to discharge the injunction on the ground of misrepresentation therefore fails. B C

I next turn to consider the submission by counsel for the third, fourth and fifth defendants, that neither the first plaintiff nor the second plaintiff has the necessary locus standi to maintain the present suit.

The term locus standi or standing in a court of law means entitlement to judicial relief apart from questions of the substantive merits and the legal capacity of a plaintiff. D

In considering the locus standi objection there are two principles I have to keep in the forefront of my mind. First, I am bound to proceed on the basis that everything alleged in the statement of claim and in the documents relied upon by the plaintiffs is true. Secondly, the jurisdiction to uphold a plea of no locus standi should only be exercised very carefully in circumstances where there is no possibility of doubt. E

The authority to which I should like to cite in support of the two principles aforesaid is the case of *Hayes v Bristol Plant Hire Ltd & Ors*,[4] an action by the director of a company for a declaration that he had been wrongfully excluded from the board, and where a preliminary point had been taken that the action was misconceived so that the court had no jurisdiction to entertain it further. The following passages in the judgment of Wynn-Parry J would appear to be in point: F

> ... I am bound to proceed on the basis that every statement in the statement of claim and every assertion in the documents referred to therein are true ... [at p 686E]. G
>
> ...
>
> Now again I pause to remind myself that I am dealing with a preliminary point going to jurisdiction. It is open to the court to stop an action such as this in limine if, on a point being properly taken, it thinks right to do so, and generally speaking, if a point as to jurisdiction is taken, it is the duty of a court to bring the proceedings to as early an end as possible. At the same time, it is quite clearly established that it is a jurisdiction which should only be used very carefully and in circumstances where there is no possibility of doubt as to the lack of jurisdiction [at p 688E–F]. H I

As for the first plaintiff, it was argued that he was neither a director nor a shareholder of TSS though he was such in Dragon, yet he had taken out an injunction on TSS's proposed EGM. It was fundamental, said counsel, that

A a party applying for an interlocutory injunction had to show that he, not someone else, would be prejudiced, if that relief was denied him. But here, all the first plaintiff had shown was that a third party would be prejudiced. This went to show that the first plaintiff's complaint was frivolous.

As for the second plaintiff, it was argued that although he was a minor shareholder in TSS he should be excluded by the rule in *Foss v Harbottle*[2] B from maintaining this suit because he had not shown any attempted fraud on himself.

There is a point regarding this part of the case which I consider I should dispose of at the outset and it is this: should the issue of locus standi be disposed of now as a preliminary point or should it be decided at the C conclusion of the trial?

In the English case of *Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2)*,[5] the Court of Appeal considered that the trial judge Vinelott J should have determined the question of Prudential's entitlement to bring a derivative action before he tried the substantive issues.

Accordingly, the issue as to whether the wrongdoers were in actual D control of the company should have been considered first before the derivative action was allowed to proceed. The court took the view that 'the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed and (ii) that the action falls within the proper boundaries of the E exception to the rule in *Foss v Harbottle* [(1843) 2 Hare 461]'.

The court did, however, accept that 'control' does embrace a broad spectrum of positions within a company and that control could arise as the result of indifference or apathy.

The obvious and no doubt the easiest way of determining whether the wrongdoers control a company is to have regard to their shareholdings. If F the majority of the shares is held by them then it goes without saying that they are in control of the company; but if that is not the case, it does not necessarily follow that they are not in control, for the court may go behind the apparent ownership of the shares, in order to determine whether the wrongdoers do in fact control the company. (See eg *Pavlides v Jensen*[6] per G Dankwerts at p 577.)

In this context, in *Prudential Assurance Co Ltd v Newman Industries Ltd & Ors (No 2)*,[7] a wider approach to the determination of control was suggested by Vinelott J. He suggested that there would be an exception to the rule in *Foss v Harbottle*[2] if it could be shown that the wrongdoers were able 'by means of manipulation of their position in the company' to ensure that H the action is not brought by the company. In that case two directors of Newman Industries deceitfully induced other members of the company to vote in favour of acquiring the assets of another company (Gladstone), in which they were personally interested at a gross over-valuation. Although the two directors did not possess the majority shareholding in Newman I Industries the action was allowed to proceed. The traditional view of 'control' is one of ownership but here is a new view of control — as to who has de facto control of the company. The Court of Appeal, whilst recognizing that there was a problem in defining 'control', refrained from solving the

problem and so left the point open. For myself, I would respectfully agree with the view of Vinelott J for, to quote Mr Walter Woon in his admirable work in *Company Law* at p 240, 'There seems nothing wrong in principle with Vinelott J's reasoning in this respect. After all, if the wrongdoers manage to obtain the approval of the majority by fraud or duress, it should surely be necessary to allow a minority member to bring an action against them even if the company will not.'

In Australia, in the case of *Biala Property Ltd & Anor v Mallina Holdings Ltd,*[8] it was held that there was no universal rule making it appropriate that the issue of locus standi be determined as a preliminary issue.

And, in *Hurley & Anor v BGH Nominees Pty Ltd & Ors,*[9] King CJ said, inter alia:

> I do not think that the procedure suggested in *Prudential v Newman*, supra, could be applied in all cases. In many cases a hearing to determine whether there was a prima facie case would be almost as long as a full trial and a good deal less satisfactory. In such cases the only reasonable course may be to determine the issue of standing, if raised as a preliminary issue, on the assumption that the allegations in the statement of claim are correct. Even on that basis it may be desirable in certain cases to distinguish sharply between the issue whether the allegations in the statement of claim, if true, disclose legal liability to the company and the issue whether the plaintiff has standing to enforce any liability which might be disclosed. It seems to me that the procedure for the determination of the issue of locus standi ought to be determined in each individual case according to what appears to be just and convenient in that case.

To revert to the question whether the issue of locus standi should be determined at this stage of the proceedings or at the conclusion of the trial, I take the view, which apparently was shared by counsel on both sides, judging from the lengthy submissions they had made, that I should rule on the issue as a preliminary point.

It appears to me that the first plaintiff is suing in two capacities; first, as director of Dragon and secondly, as a shareholder of Dragon.

If a director is excluded from participation in the management of a company, he can sue in his own right as a director. So, for example, in *Pulbrook v Richmond Consolidated Mining Co,*[10] an individual director sued the company in question and the other directors, the basis of his action being that he was being improperly excluded from the boardroom and from otherwise discharging his duties as a director, for the other directors treated him as being not a director at all. In the course of his judgment the Master of the Rolls said at p 612:

> The first question is, whether a director who is improperly and without cause excluded by his brother directors from the board from which they claim the right to exclude him, is entitled to an order restraining his brother directors from so excluding him.
>
> In this case a man is necessarily a shareholder in order to be a director, and as a director he is entitled to fees and remuneration for his services and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board. He has been excluded. Now it appears to me that this is

A an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, B because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.

Besides that, he is in the position of a shareholder, ...

It is true that there is a conflict of affidavit evidence as to whether or not there had been an attempt to exclude the first plaintiff from the meeting of C Dragon's board on 6 March 1990. However, in considering a preliminary point as to locus standi, the only reasonable course is for me to proceed on the basis that everything alleged in the statement of claim and in the documents relied upon by the plaintiffs is true.

Applying the principles aforesaid to the particular circumstances of the first plaintiff's case, I regret I am unable to accede to the objection as to D locus standi. I agree that the first plaintiff's cause of action is against the first and second defendants as directors of Dragon and against Dragon. But the matter does not rest there because the question whether the first plaintiff has a sufficient interest in the basic issue to be litigated at the final hearing, namely, whether the calling of the EGM of TSS by the first to the E seventh defendants was a proper or bona fide exercise of their powers as directors of TSS, needs to be probed.

In this context, counsel for the plaintiffs has advanced three propositions and they are:

(1) Inasmuch as the powers of the first to the seventh defendants in TSS F must be exercised bona fide and in respect of a proper purpose, this principle in the context of parent and subsidiary companies will equally strike at the hearts of directors holding controlling power in the direction of the parent company's affairs who pursue, or attempt to pursue, a course of conduct designed by them to advance their own interest or others of their choice to the detriment of the parent company or its G other shareholders and vice-versa.

(2) If a parent company nominates from amongst its own directors persons to act as directors in a subsidiary company to represent and look after the interest of the parent company on the board of directors of the subsidiary, these nominee directors cannot place themselves in a position of conflict. They must at all times ensure that utmost good faith is H observed between the parent and the subsidiary and vice versa.

(3) Where challenges are launched against the conduct of directors who are in de jure control of a parent company and who are also in de facto control of a subsidiary company upon the ground that they are manipulating their powers under both the companies to promote their personal I interest or those of their friends and there is a conflict of interest in the circumstances, the corporate veil of the two companies should be lifted to rid the facade of pretended innocence.

Although generally each company within a group of companies is a distinct entity, in certain circumstances, Malaysian courts have treated a group of companies as a single corporate entity. (See eg *People's Insurance Co (M) Sdn Bhd v People's Insurance Co Ltd*[11] at p 69 and *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor.*[12])

It is also worth mentioning that the directors of a holding company are under a statutory duty imposed by s 169(5) of the Companies Act 1965, to make a report on the state of affairs of the group. However, there is no provision in the Malaysian Companies Act 1965 equivalent to s 201(3A) of the Singapore Companies Act (Cap 50, 1990 Ed) which requires that the consolidated accounts of the whole group must be prepared.

Turning to the legal position in the United Kingdom, in *DHN Food Distributors Ltd v Tower Hamlets London Borough Council,*[13] the Court of Appeal 'looked at the business realities of a situation rather than confining itself to a narrow legalistic view'. It has been said that from the decision of the Court of Appeal in *DHN Ltd v Tower Hamlets*[13] is but a short step to the proposition that the courts may disregard *Salomon*'s case[14] whenever it is just and equitable to do so.

The leading authority relied on by Lord Denning MR in *DHN Ltd v Tower Hamlets*[13] was the decision of the House of Lords in *Harold Holdsworth & Co (Wakefield) Ltd v Caddies*[15] which he described at p 860 as a 'striking instance' of the 'tendency to ignore the separate legal entities of various companies within the group'. And, at p 860, Lord Denning also referred with approval to a passage in Professor Gower's book on *Modern Company Law* (3rd Ed) at p 216 which reads 'there is evidence of a growing tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group'.

In the circumstances, I consider that a prima facie case for piercing the corporate veil has been established.

I now turn to consider the locus standi objection as regards the second plaintiff based upon the rule in *Foss v Harbottle.*[2]

The rule which is really two rules founded on two cases, was summarized by Lord Davey in *Burland v Earle*[16] thus at p 93:

> It is an elementary principle of the law relating to joint stock of companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself.

The rule was not applied universally; several exceptions developed, which were outlined by Jenkins LJ in *Edwards v Halliwell*[17] thus at p 1067:

(1) Ultra vires acts: 'in cases where the acts complained of are wholly ultra vires the company or association the rule has no application because there is no question of the transaction being confirmed by any majority'.

(2) Fraud on the minority: 'where what has been done amounts to what is generally called in these cases as a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others'.

(3) Special majorities: 'an individual member [is not] prevented from suing if the matter ... [is] one which could validly be done or sanctioned, not by a simple majority of the members ... but only by some special majority'.

(4) Personal rights: Where 'the personal and individual rights of members of [the plaintiffs] have been invaded', the rule 'has no application at all'.

(5) When the justice of the case requires it, though this has been doubted by the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries (No 2)*.[5]

It was argued by counsel for the plaintiffs that as the injury alleged was personal to the second plaintiff as a member of TSS, the rule in *Foss v Harbottle*[2] was without application.

It was further argued that even if the rule in *Foss v Harbottle*[2] was applicable, the second plaintiff could bring himself within the fourth and fifth exceptions aforesaid.

In support, counsel cited the case of *Punt v Symons & Co Ltd*[18] where shares had been issued by the directors, not for the general benefit of the company, but for the purpose of controlling the holders of the greater number of shares by obtaining the majority of the voting power, and it was held, applying the rule in *Fraser v Whalley*,[19] that the defendants ought to be restrained from holding the meeting at which the votes of the new shareholders were to have been used.

In the course of his judgment in that case, Byrne J said this at pp 515 and 516:

> I now come to the last and most important point. It is argued on the evidence that but for the issue by the directors of the shares under their powers as directors, and, therefore, in their fiduciary character under the general power to issue shares, it would have been impossible to pass the resolution proposed; and that the shares were not issued bona fide, but with the sole object and intention of creating voting power to carry out the proposed alteration in the articles. On the evidence I am quite clear that these shares were not issued bona fide for the general advantage of the company, but that they were issued with the immediate object of controlling the holders of the greater number of shares in the company, and of obtaining the necessary statutory majority for passing a special resolution while, at the same time, not conferring upon the minority the power to demand a poll. I need not go through the affidavits. I am quite satisfied that the meaning, object and intention of the issue of these shares was to enable the shareholders holding the smaller amount of shares to control the holders of a very considerable majority. A power of the kind exercised by the directors in this case, is one which must be exercised for the benefit of the company: primarily it is given

> them for the purpose of enabling them to raise capital when required for the purposes of the company. A

And, towards the end of his judgment, at p 517, he said this:

> If I find as I do that shares have been issued under the general and fiduciary power of the directors for the express purpose of acquiring an unfair majority for the purpose of altering the rights of parties under the articles, I think I ought to interfere. I propose to grant an injunction, but to confine it to restraining the defendants from holding this confirmatory meeting. B

In the circumstances, I am satisfied that the second plaintiff too has established a prima facie case of locus standi to maintain the present suit.

It goes without saying that whether the plaintiffs' contentions, particularized above, are correct or not, can only be determined at the final hearing. C

There are four further points I wish to make. Firstly, it is only right to say at the risk of being trite, that the general purpose of an interlocutory injunction, whether prohibitory or mandatory, is to preserve the status quo in as equitable a manner as the circumstances permit pending the final disposal of the trial. The status quo in this sense may mean that prevailing at the time of the application or just before the wrongful acts complained of occurred. D

Secondly, for the avoidance of doubt, I should perhaps add that in considering this application, I was satisfied that there were serious questions both of fact and law to be tried, for reasons which I have adumbrated, — and, I would pause to add, that this was emphasized by the lengthy arguments before me which occupied some three days — and also the lengthy affidavits filed by both sides. E

Thirdly, I considered the question, whether if the plaintiffs were to succeed at the trial in establishing their right to a permanent injunction, they would be adequately compensated by an award of damages, for the loss they would have sustained as a result of the defendants' proceeding to do what was enjoined between the time of the application and the time of the trial. I recognized that if damages would be an adequate remedy and the defendants would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiffs' claim appeared to be then. (See the *American Cyanamid* case,[1] per Lord Diplock at p 408B–C.) F G

In this context, if at the final hearing the plaintiffs' contention that the EGM would have had the effect of drastically altering the control structure of TSS in favour of the shareholders said to be represented by the third to the seventh defendants, and so cause irreparable damage to the plaintiffs, is found to be correct, then I agree that damages would not be an adequate remedy because the right which it is sought to protect would be of such a nature that an award of damages would not leave the plaintiffs in all respects in substantially as good a position as if they had obtained enforcement in specie. (See Spry on *Equitable Remedies* (4th Ed) p 374.) Furthermore, in the ultimate analysis, if the plaintiffs succeed at the final hearing their loss would be difficult to quantify since it cannot be predicted what their loss of profit would be. H I

A Fourthly, I had also paid especial regard to the interests of all parties concerned, keeping in mind their foreseeable positions, considerations of hardship, the balance of convenience and all other relevant discretionary factors.

In all the circumstances, the application to discharge the injunction was dismissed with costs and an early trial ordered.

B

Application dismissed.

Reported by Wong Kian Kheong

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